Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

OLIN CORPORATION,
Petitioner,

v.

ROSALIE CULLEN,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Whether plaintiff has a submissible case of age discrimination based on this Court's forthcoming opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, No 99-536?

II. Whether courts must consider the strength or weakness of the prima facie case in deciding a motion for judgment as a matter of law at the close of all the evidence in an age discrimination case?

Parties

The caption identifies all parties to this case. Olin Corporation has no parent companies. Its non-wholly owned subsidiaries are:

Empire of Carolina, Inc.
Olin Australia Limited
Olin Benefits Management, Inc.
Olin Corporation N.Z. Limited
Olin Environmental Management, Inc.
Olin Hunt Specialty Products S.R.L.
Olin Mexico, S.A. de C.V.
Productora de Alcoholes Hidratados C.A. (PRALCA)
Sukulu Mines Limited
The Industrial Credit and Investment Corporation of India Limited
Yamaha-Olin Metal Corporation

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Opinions Below

The District Court denied Olin's motion for judgment as a matter of law in an oral ruling from the bench, so the ruling is unreported. The opinion of the United States Court of Appeals for the Seventh Circuit is published at 195 F.3d 190.

Jurisdictional Basis

The Court of Appeals issued its opinion on October 25, 1999. App. 4. On November 5, 1999, the Court of Appeals issued its order extending the time for plaintiff to seek rehearing to November 18, 1999. App. 19. On that date, plaintiff filed a timely motion for rehearing, App. 20, which the Court of Appeals denied on November 30, 1999. App. 36. Olin is filing this petition within 90 days after the date of denial of rehearing.

This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1), in that petitioner seeks review of a final opinion of the United States Court of Appeals for the Seventh Circuit.

Statutes and Constitutional Provisions

It shall be unlawful for an employer –

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a).

Statement Of The Case

The District Court had jurisdiction of this case pursuant to 28 U.S.C. §§ 1331 and 1337, in that plaintiff's cause of action arose under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*

Olin Corporation (Olin) manufactures Winchester brand ammunition at its plant in East Alton, Illinois. Between 1993 and 1995, buyers stockpiled ammunition out of fear that Congress would impose controls on the public's access to such ammunition. In mid-1995, such fears abated and the industry's sales of ammunition declined precipitously. As a result, Olin was forced to implement a cost reduction program at its East Alton plant.

Among the measures Olin initiated to cut costs was a reduction in force (RIF) of the salaried employees. In February 1996, Olin notified 74 salaried employees that they would be laid off. One such person was Rosalie Cullen (Ms. Cullen), who was 49 years old at the time. Ms. Cullen alleged that Olin terminated her because of her age.

Prior to her layoff, Ms. Cullen was manager of administration in the marketing department. She spent approximately two thirds of her time in liaison with conservation, hunter education, and youth groups. Harlan Kent, vice-president of marketing, decided to reorganize the department as part of the RIF. He decided to eliminate Ms. Cullen's position and assign the liaison functions to a newly created position known as event marketer. Mr. Kent outsourced some of Ms. Cullen's other duties and assigned the rest to several different people.

Ms. Cullen never disputed the necessity for the RIF or the legitimacy of the reorganization of the marketing department. Her principal argument at trial was that she was better qualified for the newly-created event marketing job than Judy Eberhart, one of the two people selected for that position. Ms. Eberhart was 43 at the time of the RIF. The other event marketer, Maryann Ventress, was 42 at the time of the RIF.

To prove that her qualifications were superior to Ms. Eberhart's, Ms. Cullen relied on a comparison of her personnel file with Ms. Eberhart's. Ms. Cullen's rating for the two years prior to the RIF were superior, while Ms. Eberhart's ratings for the same time were superior minus. Mr. Kent testified that he did not review those

personnel files in making his decision, and there is no evidence to the contrary. Mr. Kent selected Ms. Eberhart because he wanted the reorganized marketing department to focus on direct sales to retailers. Ms. Eberhart had experience with those kinds of sales and Ms. Cullen did not.

Ms. Cullen also relied on testimony that Doug Cahill, Winchester's president, had made ageist remarks at a meeting with all salaried personnel on December 5, 1995. The sources of this testimony were four former Olin employees who were laid off in the RIF and who had pending age discrimination claims against Olin. These witnesses testified that Mr. Cahill stated that old people could not adjust to change and would soon be gone. Mr. Cahill denied making such remarks, and Ms. Cullen herself could not remember whether he had. None of Ms. Cullen's witnesses reported the alleged remarks to Leon Schneider, Olin's personnel director, and none reported them to the EEOC.

There is no evidence that Mr. Cahill had any input into Mr. Kent's decision to select Ms. Eberhart rather than Ms. Cullen for the event marketing position. Mr. Kent, Mr. Cahill, and Mr. Schneider each testified that Mr. Kent made that decision, not Mr. Cahill.

The jury returned a verdict for Ms. Cullen and the District Court entered judgment accordingly. The Court of Appeals reversed the judgment because the District Court had erroneously allowed Ms. Cullen to introduce evidence of Ms. Eberhart's performance after the RIF. The Court of Appeals rejected Olin's argument that Ms. Cullen did not have a submissible case of age discrimination. The basis for this holding was the reassignment of her duties to younger employees; her superior job ratings; and Mr. Cahill's alleged remarks. App. 12.

Argument

Employment litigation in general, and age discrimination litigation in particular, is exploding. In 1999 alone, federal appellate courts issued more than 1,000 opinions in discrimination cases, and half of those dealt with age discrimination. Between 1992 an 1998, new employment cases in the district courts increased from less than 11,000 to almost 24,000. In fiscal year 1999, almost 10% of the new civil cases filed in federal district courts were employment cases.

The cause of this explosion is not any increase in the amount of actual age discrimination. In these prosperous times, with employers desperate to attract and retain high quality employees, age discrimination makes no sense for a rational employer. The cause of the explosion is the ease with which counsel can convert an age discrimination case into a review of the quality of the employment decision – and the lure of the six and seven figure judgments that accompany a finding of discrimination.

On November 9, 1999, this Court granted certiorari in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536. It is crystal clear from the Court of Appeals' opinion in *Reeves* that plaintiff's trial theory was that he was a good employee; his employer's contrary opinion was therefore pretextual; and he therefore had a submissible case of age discrimination. The instant case involves exactly the same sort of second-guessing of the wisdom of the employment decision.

Congress never intended the ADEA to turn the federal courts into employment courts whose function is to review the quality of an employer's decisions. It is essential for this Court to clarify the law to restrict the ADEA to its intended purpose. The instant case, along with *Reeves*, offers the opportunity to do so.

I. This Court's Forthcoming Opinion In *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536, Will Likely Control The Submissibility Of The Instant Case.

In *Reeves*, this Court will resolve a circuit split over the amount of proof necessary for an age discrimination plaintiff to avoid judgment as a matter of law. The evidence on which the Court of Appeals relied in the instant case is significantly less probative than the plaintiff's evidence in *Reeves*. Thus, this Court's disposition of *Reeves* is likely to control the instant case.

Reeves was a 57-year old supervisor. Sanderson terminated him for numerous timekeeping errors and false statements that allegedly prevented his department from meeting its production targets. His replacements were all under the age of 40. Several months before that termination, the director of manufacturing, Powe Chesnut, allegedly told Reeves that:

A. He was so old he "must have come over on the Mayflower;" and

B. He was "too damn old to do the job."

Reeves testified at trial that he was meticulous about his recordkeeping, and that any errors in those records were the fault of his direct superior, who was also terminated. In addition, Chesnut could not quantify the cost to Sanderson of the alleged errors. Reeves argued that this evidence proved that the stated reason for his discharge was pretextual, thereby permitting the jury to infer discrimination.

The Fifth Circuit held that this evidence might make a submissible case of pretext – but that the law also required him to prove that age discrimination motivated the employment decision. It held that Chesnut's ageist remarks were insufficient to satisfy that burden, because:

A. Those remarks were not in the direct context of Reeves' termination;

B. Chesnut was one of three persons who recommended termination; and there was no evidence that the other two had any age bias; and

C. There was no evidence that Sanderson's president, who made the final decision, had any age bias.

Reeves App. at 9a.

In the instant case, the Court of Appeals found that Ms. Cullen had a submissible case of age discrimination based on three pieces of evidence:

A. "Virtually all of Cullen's duties were taken over by younger employees, ranging in age from thirty-two to forty-three years of age."

B. "[U]ndisputed proof that Cullen's performance ratings were consistently in the 'superior' category."

C. The ageist statements allegedly "made by Cahill."

App. 12.

That is significantly *less* evidence of age discrimination than Reeves had. Ms. Cullen was 49 at the time of the RIF. Tr. 66. Olin assigned two thirds of her duties to Ms. Eberhart and Ms. Ventress, who were 43 and 42 respectively. D.Ex. 13a. Thus, Ms. Cullen's principal replacements were six and seven years her junior, versus the 17-year age differential in *Reeves*. In the Seventh Circuit, one cannot infer age discrimination when the plaintiff's replacement is less than ten years her junior, at least at the prima facie case stage of the proceedings. *Fisher v. Wayne Dalton Corp.*, 139 F.3d 1137, 1141 (7th Cir. 1998).

As the Court of Appeals observed, Mr. Kent did not review Ms. Cullen's personnel files or performance ratings in making his

decision. App. 8, 9. There is no evidence to the contrary. Instead, he relied on interaction with her on the job and on discussions with Mr. Schneider. Tr. 395-96. As the Court of Appeals recognized, Olin "'could not have been motivated by knowledge it did not have . . . .'" App. 14, *quoting McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 359 (1995). The same is true for Mr. Kent.

Finally, Mr. Cahill's involvement in Ms. Cullen's termination was substantially less than Chesnut's involvement in the Reeves termination. Chesnut was one of three people who recommended that termination. Mr. Kent, Mr. Cahill and Mr. Schneider all testified unequivocally that Mr. Kent made the decision to terminate Ms. Cullen and Mr. Cahill did not. Tr. 394; 460; 547. There is no evidence that Mr. Cahill made any recommendations to Mr. Kent about whom he should terminate.

In short, Ms. Cullen's evidence of age discrimination rests on an inference that is unreasonable as a matter of law; employment records that the decision-maker never saw; and stray remarks from a person not materially involved in the employment decision. That evidence is identical in kind, but substantially less in quality, than the evidence Reeves had. If this Court affirms *Reeves*, it must necessarily reverse the instant ruling. Alternatively, there is a "reasonable probability" that the Court of Appeals would reach a different result "if given the opportunity for further consideration" in light of this Court's opinion in *Reeves*. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). For either reason, this Court should hold the petition pending its decision in *Reeves*, vacate the judgment, and remand to the Court of Appeals for reconsideration in light of *Reeves*.

II. There Is A Circuit Split On The Relevance Of The Prima Facie Case To The Disposition Of A Motion For Judgment As A Matter Of Law.

This Court's opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), has produced a circuit split on whether the prima

facie case has any utility in assessing a motion for judgment as a matter of law. Some circuits (pretext plus circuits) hold that plaintiff must prove more than pretext and that the strength of the prima facie case is a relevant and sometimes critical factor in proving discrimination. Other circuits (pretext only circuits) hold that pretext alone makes a case and that the prima facie case is irrelevant to the motion for judgment as a matter of law. The language in *Hicks* supports both arguments.

One part of *Hicks* holds that "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, and that discrimination was the real reason." 509 U.S. at 515 (emphasis original). Later, the opinion holds that it is "not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." 509 U.S. at 519 (emphasis original). *Hicks* also supports an argument that the prima facie case is relevant to proof of "pretext plus":

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, *together with the elements of the prima facie case*, suffice to show intentional discrimination.

509 U.S. at 511 (emphasis added).

Circuits following these parts of *Hicks* require proof of pretext plus, and recognize that the strength of the prima facie case is an important element in establishing the plus factors. For example, the Eighth Circuit has held:

> Only where the evidence of plaintiff's prima facie case and the evidence of pretext are sufficient, considered together, to allow a reasonable factfinder to conclude that the defendant has intentionally discriminated against the plaintiff is "no additional proof of discrimination . . . required."

Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1335 (8th Cir. 1996). *Accord, Barbour v. Dynamics Research Corp.*, 63 F.3d 32, 39 (1st Cir. 1995), *cert. denied*, 516 U.S. 113 (1996) (while "some cases exist where a prima facie case and the disbelief of pretext could provide a strong enough inference of actual discrimination . . . we do not think that the Supreme Court meant to say that such a finding would always be permissible") (citations and internal punctuation omitted); *Fisher v. Vassar College*, 114 F.3d 1332, 1338 (2d Cir. en banc 1997), *cert. denied*, 522 U.S. 1075 (1998) ("a finding of pretext, together with the evidence comprising a prima facie case, is not always sufficient to sustain an ultimate finding of intentional discrimination"); *Vaughan v. MetraHealth Cos.*, 145 F.3d 197, 201 (4th Cir. 1998) ("[d]epending on the character of the evidence in each case, a discrimination claim *may* survive summary judgment solely on the strength of the prima facie case and the evidence that contradicts the employer's proffered justification") (emphasis original); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) ("[t]here may be cases in which the prima facie case and proof of pretext goes the plaintiff's way, but a judgment for the plaintiff would still be legally questionable") (citations and internal punctuation omitted).

Courts in these circuits must consider the strength of the prima facie case in evaluating a motion for judgment as a matter of law. In these circuits, the strength of the inference of discrimination arising from the prima facie case may be dispositive of submissibility.

Other parts of *Hicks*, however, support the pretext only rule, in which courts ignore the prima facie case in determining submissibility:

> [R]ejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, [n]o additional proof of discrimination is *required* . . . .

509 U.S. at 511 (emphasis original) (citations and internal punctuation omitted). This part of the *Hicks* opinion also states that the *McDonnell-Douglas* factors are "no longer relevant," and that the presumption created by the prima facie case "simply drops out of the picture" after the defendant proffers facially neutral reasons. 509 U.S. at 510-11.

Several circuits have relied on this part of *Hicks* in support of the pretext only rule. The Ninth Circuit's opinion in *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993), is a good illustration:

> Because ... the factfinder in a Title VII case is entitled to infer discrimination from a plaintiff's proof of a *prima facie* case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true.

10 F.3d at 1433. *Accord, Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998) ("disbelief of the defendant's proffered reasons, together with the prima facie case, is sufficient circumstantial evidence to support a finding of discrimination").

The Seventh Circuit has cases going both ways. *Compare, Courtney v. Biosound, Inc.*, 42 F.3d 414, 418 (7th Cir. 1994) ("employee need only produce evidence from which a rational fact-finder could infer that the company's proffered reasons were pretextual"), *with, Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1399 (7th Cir. 1997) (proof of pretext "permits (depending of course on the other evidence presented at trial) an inference that the true reason which it is hiding is discriminatory").

For courts in pretext only circuits, the strength or weakness of the plaintiff's prima facie case is irrelevant. In these circuits, "once a case is tried on the merits, the trial court is no longer concerned with whether the plaintiff made out a *prima facie* case." *Wall v. Trust Co. of Georgia*, 946 F.2d 805, 809 (11th Cir. 1991).

No doubt for these reasons, the Court of Appeals did not discuss the strength or weakness of Ms. Cullen's prima facie case. App. 11-12, 15. Had it done so, it would likely have reversed the judgment outright, because she did not have a prima facie case of age discrimination. Under *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 134 L.Ed.2d 433 (1996), one cannot infer age discrimination "from the replacement of one worker with another worker insignificantly younger." 134 L.Ed.2d at 449. As noted, the Seventh Circuit holds that an age differential of less than ten years is presumptively insubstantial. *Fisher, supra*, 139 F.3d at 1141. An inference that is unreasonable as a matter of law at the prima facie case stage is equally unreasonable at the judgment as a matter of law stage.

In the instant case, Olin reassigned two thirds of Ms. Cullen's duties to Ms. Eberhart and Ms. Ventress. App. 7. These people were, respectively, six and seven years younger than Ms. Cullen. Only two of the seven people who inherited Ms. Cullen's duties were more than ten years her junior, and those two spent "a very small amount of time" performing those duties. Tr. 402-03. If an insignificantly younger replacement affords no reasonable inference of age discrimination, assignment of an insignificant portion of plaintiff's duties to workers who are significantly younger does not permit such an inference either.

Federal courts must consider the strength of the prima facie case in order to avoid becoming employment courts. In pretext only jurisdictions, plaintiffs typically do just what Ms. Cullen did: litigate the quality of the employment decision. Her trial theme was that she was better qualified than Ms. Eberhart; therefore, Olin's preference for Ms. Eberhart must have been pretextual; therefore, Ms. Cullen has proven age discrimination. Evidence that Olin may have made a poor employment decision is not legitimate proof of age discrimination.

The relevance of the prima facie case to submissibility is closely related to the pretext/pretext plus issue that the Court will review in

Reeves, but it is not identical. The Court should therefore grant the petition in the instant case. In the alternative, the Court should address this issue in its opinion in *Reeves*, vacate the Court of Appeals' decision, and remand with instructions to reconsider in light of *Reeves*. *Chater, supra*, 516 U.S. at 167.

III. The Court Should Consider The Relevance Of The Prima Facie Case To The Disposition Of A Motion For Judgment As A Matter Of Law Because Of The Importance Of The Issue.

Even without the clear circuit conflict, this Court ought to consider whether the prima facie case is relevant to assessing a motion for judgment as a matter of law. In light of the increasing number of employment cases, both plaintiffs and defendants are entitled to a clear statement of what issues are relevant to the submissibility of such cases.

Refusing to consider the strength or weakness of the prima facie case when reviewing a motion for judgment as a matter of law is both illogical and unfair. It is illogical because an unreasonable inference at the prima facie stage of the case is no more reasonable on motion for judgment as a matter of law. The suggestion that the *McDonnell-Douglas* test becomes irrelevant at that stage misstates this Court's holdings in both *Hicks* and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981):

> In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. . . . [T]his evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual.

450 U.S. at 256 n.10.

Ignoring the prima facie case is also unfair to defendants, because it creates a complete double standard. At least in the Seventh Circuit,

Ms. Cullen does not have a prima facie case of age discrimination, because the persons who assumed her duties were not substantially younger than she. Had the District Court granted Olin's motion for summary judgment, it could have claimed the protection of this Court's opinion in *O'Connor* – and the Court of Appeals would have affirmed the judgment. Since the District Court erroneously allowed the case to go to the jury, however, Olin cannot argue *O'Connor* – at least not in pretext only circuits. The inequity of that result is an additional reason to grant the petition.

Conclusion

For these reasons, Olin respectfully prays that the Court grant Olin's petition for certiorari and reverse the Court of Appeals' ruling that Ms. Cullen had a submissible case. Alternatively, Olin respectfully prays that the Court hold this petition pending the disposition of *Reeves*, vacate the Court of Appeals' opinion, and remand for reconsideration in light of *Reeves*.

Respectfully Submitted,

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APPENDIX

APPENDIX A

IN THE DISTRICT OF
THE UNITED STATES OF AMERICA
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Case No. *97-31-GPM*

ROSALIE CULLEN,
Plaintiff,

vs.

OLIN CORPORATION,
Defendant.

EVIDENTIARY HEARING ON FEES & FRONT PAY

BE IT REMEMBERED AND CERTIFIED that heretofore on *11/24/98,* the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, HONORABLE *G. PATRICK MURPHY,* United States District Judge presiding, the following proceedings were recorded by mechanical stenography, transcript produced by computer.

APPEARANCES:

FOR THE PLAINTIFF: ATTORNEY AT LAW, **D. Eric Sowers**, 1401 S. Brentwood Blvd., #575, St. Louis Missouri 63144 and CARR, KOREIN TILLER, et al., BY: **Ferne P. Wolf**, 412 Missouri Ave., East St. Louis, Illinois 62201

FOR THE DEFENDANT: HARRIS, DOWELL, et al. BY: **Ronald K. Fisher** & **Diane R. Francis**, 15400 South Outer Forty, Suite 202, Chesterfield, Missouri 63017-2063

REPORTED BY: *Molly N. Clayton,* CSR, Official Court Reporter (618) 874-4665

ORIGINAL

* * *

[101]

reality of the modern world that we live in. I wish it were not so.

I believe that Rosalie Cullen would be a happier person, a more fulfilled person, if she could go out and find something that was comparable to what she had. I think she would rather have that than the money. I say that because work has been her life. I think at some point in the testimony — you don't have any children, is that right, Mrs. Cullen?

MRS. CULLEN: None.

THE COURT: You've got a husband, you are trying to take care of him. But I have to look at the world as it is. As 52-year-old woman you're not going to get hired on at the kind of money you were making. You're a risk. Just your insurance would be substantial, very substantial. So all the Court can do is give you some money and give you what it finds to be fair and reasonable under all the circumstances. And again that's $410,282.

Now all that's left to do is, there are several pending motions. The plaintiff — the defendant timely moved for judgment at the close of the plaintiff's case. I took that under advisement renewed the motion at the close of all the evidence. The motions are denied. I think that there is a rationable [sic] reasonable basis for the jury deciding what it decided. It didn't have to decide it that way. If this had been a verdict for the defendant it would have stood. I **[102]** wouldn't have changed it. I just believe that this was a verdict where the jury could have gone either way with it. Powerful arguments were made for both sides and the jury just choose to come down with the plaintiff. Now the only issue is whether the plaintiff made a prima facie case under the case law as it was and I think when you look at the particular facts of this case the plaintiff did. There was enough to go to the jury and there was enough there for the jury's verdict to stand.

I know there were objections to the instructions but having re-read Judge Easterbrook's decision I'm more confident now than ever that the jury was properly instructed. I will prepare a judgment today and you can pick it up before you go home. That should take care of everything that's before the Court except that I am to double the actual damages awarded because there was a willful finding by the jury. And I will do that and my judgment will reflect that. Now have I tied up all the loose ends?

MR. FISHER: Yes, your Honor.

THE COURT: All right. Again you can pick up the judgments and I'm sure this is not the end of this case. Again I want to compliment the lawyers on the wonderful job they did on both sides of presenting this case. It involved many interesting issues. I certainly agree with Mr. Sowers that these cases are not the easiest cases to deal with; but you

* * *

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No.98-4277

ROSALIE CULLEN,
Plaintiff-Appellee,

v.

OLIN CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 97 C 31 — **G. Patrick Murphy**, *Judge.*

ARGUED APRIL 14, 1999 — DECIDED OCTOBER 25, 1999
Before COFFEY, FLAUM and EASTERBROOK, *Circuit Judges.*

COFFEY, *Circuit Judge.* Plaintiff-Appellee Rosalie Cullen ("Cullen") was forty-nine years of age and was employed by the Defendant-Appellant Olin Corporation ("Olin") as a manager of marketing administration when she was terminated in February of 1996 because, according to Olin, a Reduction in Force ("RIF") was necessary due to a turn in the economy.[1] Cullen brought suit against Olin alleging she was discharged, not because of any need for a RIF, but because of her age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA").[2] The case went to trial and the jury rendered a verdict

[1] In 1994, the Winchester Division earned $22.4 million on sales of $295 million. In 1995, sales dropped to $273 million and profit dropped to $4.7 million. Cahill forecasted a continued decline and in 1996, sales dropped to $225 million with the Winchester Division losing $5.8 million.

[2] The ADEA makes it "unlawful for an employer... to discharge any individual or otherwise discriminate against any individual with respect to his

(Footnote 2 continued on next page)

finding that Olin had discriminated against the Plaintiff in violation of the ADEA. The trial judge entered judgment in favor of Cullen in the amount of $850,000, consisting of actual and liquidated damages, front pay, and attorney's fees. On appeal, Olin alleges that the Plaintiff presented insufficient evidence to support the jury's verdict and that the judge abused his discretion in admitting certain evidence. We vacate the judgment and remand for a new trial.

BACKGROUND

For over 25 years, from March of 1969 thru February of 1996, plaintiff-appellee Cullen was employed by Olin at its Winchester Division in East Alton, Illinois,[3] as the manager of marketing administration. Cullen's position required that she: 1) function as a liaison between the Winchester Division and hunter education groups, youth groups, consumers, retailers and distributors (60-65% of her time); 2) procure promotional items and materials (10-15% of her time); 3) administer two buildings which housed the marketing department (10-15% of her time); 4) monitor the marketing department budget (5-10% of her time); and 5) occasionally perform special projects (5% of her time). The record also demonstrates that during the last few years of her employment, Cullen repeatedly received "superior" rankings in her performance reviews.

On December 5, 1995, Doug Cahill ("Cahill"), the president of the Winchester Division, met with Olin senior management and thereafter held a meeting with the salaried employees at the East Alton facility. Cahill advised the employees that the Win-

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(Footnote 2 continued)

compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The protected class is employees forty years of age and over. *Id.* at § 631.

[3] The Winchester Division is engaged primarily in the manufacture, distribution, and sale of sporting and military ammunition.

chester Division was in the midst of a financial downturn and warned that cost cutting and personnel reductions were inevitable. At trial, four former Olin employees who attended the Cahill meeting testified about additional remarks that they claim Cahill made, including statements that the older people at Winchester "were old fashioned and couldn't adjust to the changing times and that in the near future some of them would be gone" and that "older people have trouble with change and that they were gonna have to learn to go with the change or conform or they were going to be out." Another former employee testified that "[Cahill] gave the state of the business, so to speak, and where losses were and about equipment being antiquated and people being antiquated, that a lot of people didn't like to go with new procedures or updated things, and there would be a great many of us that was [sic] in that room at that time who would not be with Olin after the first of the year." Cahill denied making any statements concerning the age of Olin's employees or suggesting that older employees would be likely candidates for termination.

On February 6, 1996, as part of the RIF necessitated by the decline in ammunition sales, Cullen and seventy-three other Winchester Division employees were terminated. The RIF involved terminations in all but two departments and required a complete review of all the talents, skills, duties, and responsibilities of approximately 350 employees. To best implement the RIF, Cahill assigned the vice-presidents of each department to a committee known as "VAR".[4] The VAR committee prepared a

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[4] At Harlan Kent's deposition, which was read into the trial record, he testified that "VAR" stands for "value-added restructuring" but that it is "an acronym that could have meant many things. We essentially . . . tried to come up with a code name so that when we had meetings it wasn't obvious what we were meeting on." Kent stated that the code name was created in the hopes "that people would focus on the day-to-day tasks and not be speculating about the possible future."

list of employees recommended for termination. Vice-presidents were neither instructed to select any particular number of employees for termination, nor were they required to achieve any designated savings from each department. In fact, the vice-presidents were given neither written nor verbal guidelines upon which to base their decisions.

According to Harlan Kent ("Kent"), the vice-president in charge of the sales and marketing department (where Cullen was assigned), he was ultimately responsible for the decision to terminate Cullen. Kent also described the role Cahill played in the selection process. He stated that Cahill "set parameters for the general process of making the decisions . . . in [the] respective departments" and Kent would update Cahill "on a regular basis as to the decisions he was making . . ." but that Cahill "was not making those decisions *per se.*"[5] Kent further testified that Cahill reviewed the personnel selections as part of the VAR.

At trial, Kent explained the process he utilized in selecting employees he chose to recommend for discharge. Initially, he testified that his strategy to cut costs in the marketing department was to implement a new organizational structure and assign the most appropriate and qualified personnel to the proper jobs within the newly created structure. The new organization eliminated Cullen's position as manager of marketing administration. Kent created two new positions for "event marketers" which were filled by Judy Eberhart and her associate Maryann Ventress (ages 43 and 42 respectively); two-thirds of Cullen's duties were reassigned to these two positions. Cullen's remaining duties were spread among other employees at Olin, contracted to outside agencies, or eliminated.

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[5] The record does not reveal whether Cahill ultimately reviewed Kent's decision to terminate Cullen or whether Kent's decision was final. But the resolution of this issue is unnecessary for this appeal.

Cullen's case focused on attempting to establish that because of her age she was passed over for an event marketer position, and that Eberhart and Ventress were not as qualified as she was to perform in the newly created position. Kent testified that his decision to terminate the Plaintiff was based on direct discussions with her, interaction with her on the job, and discussions with her superiors. In contrast, Cullen testified that she only met with Kent on two occasions: 1) when she submitted a "booklet" detailing her goals and objectives in an attempt to inform Kent what her responsibilities included; and 2) on the date she was terminated. Kent further stated that he had not reviewed Cullen's personnel files. Kent testified that he chose Eberhart and Ventress over Cullen by examining "what jobs people had held and what were their skills and their experience." He believed that Eberhart and Ventress were better suited for the positions because they had "retail experience and selling experience," something that Kent believed necessary to be successful at the job. Cullen, on the other hand, "did not have that direct experience working with retailers." At trial, Cullen argued that these explanations were pretextual and covered up the real reason she was terminated: her age.

In support of her argument that Olin's reasons for her termination were pretextual, Cullen argued that she was more qualified than Eberhart. To prove her contention, Cullen pointed to the fact that she was rated as a "superior" employee even up to the date of her termination. She also produced numerous letters from conservation groups and youth hunter organizations which commended her on her performance with the Winchester Division. Cullen contrasted her performance evaluations with those of Eberhart, whose personnel file contained a memorandum, authored in August of 1995, wherein Eberhart memorialized a recent conversation with one of her supervisors. In the memo, Eberhart expressed her "extreme concern" over the events of the past few weeks after twenty-one years of "problem-free employment." While the memo does not describe "the events" Eberhart

is referring to, she states that "a few minor comments were unnecessarily magnified. . . ." In addition, she wrote that her supervisor had "assured me that my reputation had not suffered because of the problems" and told her that she was not on probation and her future with Olin was not in jeopardy. This memorandum constitutes the only evidence containing adverse information in Ms. Eberhart's personnel files prior to the date of the RIF and Cullen's termination. Furthermore, Kent stated that he had not seen Eberhart's memorandum at the time he made the decision to terminate Cullen and transfer Eberhart to the newly created "event marketer" position.

In addition to the memorandum and performance evaluations prepared prior to the February 6, 1995 reduction in force, Cullen introduced evidence of Ms. Eberhart's work-related problems which occurred following the RIF. Olin objected, both in pretrial proceedings and at trial, to the admission of any testimony or documents concerning Eberhart's post-RIF performance, on the ground that such evidence was irrelevant to Olin's state of mind in deciding to terminate Cullen. The district court rejected those objections, simply stating that "[o]ne theory advanced by the defense in this case, it is a theory for the jury to consider, is that [Eberhart] was better suited for [the event marketer position]. Now the jury can look at this and make up their own mind." The evidence admitted included a review of Eberhart's job performance written by Kent in May of 1996 wherein Kent stated that "well thought out analysis is lacking"; that Eberhart's understanding of financial analysis is "a major weakness"; and that she had a "tendency to bulldoze people." The review also discusses Eberhart's decision to accept an airline ticket from an Olin vendor, and mentions her statement that she should be "less naive about the fact that outside vendors could try to bribe me." In November of 1996, Eberhart was placed on probation because of: 1) problems in the telemarketing department which she supervised; 2) the airline ticket incident; and 3) two instances of Olin customers yelling at Eberhart on the telephone.

Following a four-day trial, the jury rendered a verdict for Cullen in the amount of $850,000 in damages and attorney's fees. Olin appeals.

ISSUES

Olin contends that: 1) the Plaintiff failed to present sufficient evidence of age discrimination to support the jury verdict against Olin; and 2) the trial court abused its discretion in allowing Cullen to present evidence of Eberhart's performance following the RIF.

DISCUSSION

A. Circuit Rule 30

Under Circuit Rule 30(b)(1), as amended December 1, 1997, the appellant has the unambiguous duty to include in the Appendix "all opinions, orders, or oral rulings in the case that address the issues sought to be raised." In this case appellant's counsel failed to comply with Circuit Rule 30 when he failed to attach the district court's ruling concerning motions in limine as well as the trial judge's final evidentiary ruling. To add insult to injury, counsel falsely certified that he complied with Circuit Rule 30. We have repeatedly warned appellants and their counsel that failure to follow the clear requirements of Rule 30 is subject to appropriate sanctions. *E.g., Pabst Brewing Co. v. Corrao,* 161 F.3d 434, 438 n.1 (7th Cir. 1998); *Hibben v. Nardone,* 137 F.3d 480, 481 n.1 (7th Cir. 1998); *Tangwall v. Stuckey,* 135 F.3d 510, 515 (7th Cir. 1998); *Hill v. Porter Mem. Hosp.,* 90 F.3d 220, 225-27 (7th Cir. 1996). Failure to attach the necessary documents impairs the ability of the court to thoroughly consider all issues raised, for "[w]e cannot consider arguments that the lower court was incorrect and should be reversed if the written orders and transcript pages containing the appealed decisions are not before us." *Hill,* 90 F.3d at 226. Accordingly, we are issuing an order to show cause why appellant's counsel should not be sanctioned for his disregard of this circuit's rules.

B. Evidence at Trial

Olin argues that the evidence presented at trial was legally insufficient to support a judgment for Cullen on her age discrimination claim. We review *de novo* a trial court's denial of a motion for judgment as a matter of law. *See Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1043 (7th Cir. 1999). We have recently stated that "[a]ttacking a jury verdict is a hard row to hoe[,]" and we will reverse the verdict only if there is "no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party." *Id.* 173 F.3d at 1043. In other words, we will overturn the jury's verdict only if "no rational jury could have found for the plaintiff." *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 629 (7th Cir. 1996). "We apply this standard stringently in discrimination cases, where witness credibility is often crucial." *Collins v. Kibort*, 143 F.3d 331, 335 (7th Cir. 1998) (quoting *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 948 (7th Cir. 1998)).

Initially, we note that four of the witnesses at trial testified about age-related remarks Cahill made in his December 5, 1995, address to salaried employees. According to those witnesses in attendance, Cahill stated that some Winchester employees were "old fashioned," "couldn't adjust to the changing times," and "in the near future some of them would be gone." He further said that "older people have trouble with change and that they were gonna have to learn to go with the change or conform or they were going to be out." We have held that "an employer statement that reveals hostility to older workers" may constitute evidence of age discrimination, *see Casteleman v. Acme Boot* Co., 959 F.2d 1417, 1420 (7th Cir. 1992), and a reasonable jury could have believed these four witnesses, as well as disbelieved Cahill's denials of making these statements, and concluded that Cahill targeted older employees for termination.

Defendant Olin argues that Cahill did not decide to terminate Cullen, rather Kent did. Thus, Olin contends that even if we

accept the fact that Cahill made age-disparaging remarks, he was so far removed from the selection process that his remarks do not show that age motivated Cullen's discharge. Of course, "a statement must relate to the motivation of the decision-maker responsible for the contested decision[,]" *Rothman v. Emory Univ.*, 123 F.3d 446, 451 (7th Cir. 1997) (internal citations omitted), and isolated comments that amount to no more than "stray remarks" will not suffice. *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989) (citation omitted).

At trial, the Plaintiff elicited testimony that Cahill, the president of the Winchester Division, decided that personnel cutbacks were necessary, set the parameters for the RIF, and reviewed the vice-presidents' personnel decisions. In addition, Cahill testified that he participated in a number of the VAR meetings involving the group of vice-presidents who developed the list of employees suitable for termination.

In addition to Cahill's remarks, Cullen introduced further evidence that she was fired because of her age. Virtually all of Cullen's duties were taken over by younger employees, ranging in age from thirty-two to forty-three years of age. This fact, combined with undisputed proof that Cullen's performance ratings were consistently in the "superior" category, and the statements made by Cahill, permitted a jury to reasonably infer that age constituted a factor in Olin's decision to discharge her. The totality of these factors convince us that a reasonable jury could have found that Cahill's age-related remarks were causally related to the decision to terminate Cullen, and could have allowed a rational jury to conclude that age played a role in Cullen's termination.

C. Eberhart's Performance Following the RIF

We are very concerned by the trial judge's decision to admit evidence of Eberhart's poor performance in her new position

subsequent to the February 6, 1996 RIF. At trial, the Plaintiff attempted to introduce Eberhart's entire personnel file, including evaluations and other documents containing reviews of her performance, some of which were drafted following the RIF. One document, a May 1996 review of Eberhart conducted by Kent, concluded that "well thought out analysis is lacking"; that Eberhart's understanding of financial analysis is "a major weakness"; and that she had a "tendency to bulldoze people." Moreover, as stated previously, the review mentions Eberhart's decision to accept an airline ticket from an Olin vendor, and includes her comment that she needed to become "less naive about the fact that outside vendors could try to bribe me."

In November 1996, eight months after the RIF, Kent placed Eberhart on probation. This fact is memorialized in a written memorandum from Eberhart and addressed to Kent wherein Eberhart explained her "side of the story" regarding the problems leading up to him placing her on employment probation. The memo discusses problems in the telemarketing department which she supervised; the airline ticket incident which Eberhart labeled "pure stupidity on my part"; and two instances of Olin customers "screaming" at Eberhart over the telephone. The memo concludes with Eberhart writing "I apologize for the fact that you have lost faith in me. . . . I hope that you will give me the benefit of a doubt and a second chance."

Both pre-trial and at trial, Olin objected on relevance grounds to the introduction of "those portions of the exhibit[s] that have documents that discuss Ms. Eberhart's performance after the RIF." The district court overruled the objections, reasoning that the jury should be allowed to consider whether Eberhart "was better suited for [the event marketer] job that resulted from the RIF." On appeal, Olin argues that admission of the post-RIF evaluations constitutes an abuse of discretion because at the time of the RIF, Olin could not have predicted that Eberhart would later suffer from below par performance. Moreover, Olin argues,

Cullen's ADEA suit "does not turn on whether Ms. Eberhart was in fact better qualified than Plaintiff, but whether Olin honestly believed that Ms. Eberhart was better qualified" *at the time it selected her for termination,* not months afterwards. Olin further contends that the admission of this evidence was prejudicial because the post-RIF evidence was the best evidence of Eberhart's deficiencies, and throughout the trial Cullen repeatedly pointed to Eberhart's deficiencies to prove that Cullen was more qualified than Eberhart for the event marketer position, and thus another factor, age, must have motivated Olin.

We review the trial court's admission of evidence for an abuse of discretion. *See Matter of CLDC Management Corp.,* 72 F.3d 1347, 1353 (7th Cir. 1996). In *McKennon v. Nashville Banner Publ'g Co.,* 513 U.S. 352, 356(1995), the issue was "whether all relief must be denied when an employee has been discharged in violation of the ADEA and the employer later discovers some wrongful conduct [occurring before the employee was discharged] that would have led to [a lawful] discharge if it had been discovered earlier." The Supreme Court ruled that the Plaintiff was entitled to seek relief under the ADEA because Plaintiff's "misconduct was not discovered until after she had been fired. The employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason." *Id.* at 359-60. Olin points out that *McKennon* is the mirror image of the case *sub judice,* and we agree. Eberhart's performance evaluations given *after* plaintiff-appellee Cullen was terminated cannot be relevant to demonstrate what Olin believed *at the time Cullen was terminated.* In other words, Eberhart's unsatisfactory performance months after the reduction in force had no bearing on management's state of mind at the time the decision to terminate Cullen was made, and thus that evidence is totally irrelevant to a determination of whether Cullen was terminated in violation of the ADEA. In the words of our highest court, Olin "could not have been motivated by knowledge it did not have. . . ."

The plaintiff-appellee Cullen argues that even if the trial court abused its discretion in admitting the post-RIF documents, the error was harmless because the evidence did not have a "substantial and injurious effect or influence in determining the jury's verdict." *See Williams,* 137 F.3d at 951 (citations omitted). We disagree with Cullen's contention. In opening argument, Plaintiff's counsel read virtually the entire text of the disputed documents to the jury, in the context of demonstrating that Eberhart had problems performing her new job responsibilities after Cullen was gone. Moreover, the contents of the documents were discussed in Plaintiff's cross-examination of Kent and another Olin representative, and at one point Cullen's counsel even corrected a witness and insisted in open court that statements in the documents were made *after* the RIF. Finally, Plaintiff's closing argument asserted that Eberhart had "botched this event marketing job so badly" after Cullen left, that Olin had to rehire a former employee to handle the accompanying duties. Throughout the trial, one of the Plaintiff's primary themes was that Eberhart was less qualified than Cullen, and thus Cullen must have been terminated because of her age. We are convinced that the most compelling and supportive evidence used to establish Cullen's point was contained in evaluations and memoranda created as a result of Eberhart's questionable activities following the RIF and Cullen's termination. Because the post-RIF evidence was irrelevant to the reasons Olin terminated Cullen, it should not have been admitted, and its admission was prejudicial.[6]

CONCLUSION

Because we hold that the Plaintiff submitted sufficient evidence to support the jury verdict, we decline to reverse the

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[6] This is not to say that the documents could not have been redacted to eliminate all reference to post-RIF evaluations and then admitted properly into evidence.

judgment on that ground. But, since the district court abused its discretion in admitting evidence of Eberhart's performance following the RIF, and that evidence was prejudicial, we VACATE the judgment and REMAND the case to the district court for a new trial. As stated previously, we are also issuing an order to show cause why appellant's counsel should not be sanctioned for his disregard of Circuit Rule 30.

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-4277

ROSALIE CULLEN,
Plaintiff/Appellee,

vs.

OLIN CORPORATION,
Defendant/Appellant.

APPELLEE'S MOTION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR REHEARING

Comes now Appellee, Rosalie Cullen, and moves the court for an extension of time in which to file her Petition for Rehearing. In support of her motion, Cullen states that she is asking for additional time so that she can request and obtain a copy of the record from the Court of Appeals in order to prepare her Petition.

1. The Court of Appeals reversed the judgment in this case on an evidentiary issue. The portions of the record relating to the evidentiary issue were not included in the Appendix, so Cullen needs to refer to the record in order to prepare her Petition for Rehearing. (Appellant's failure to include the portions of the record led this court to enter a show cause order. This failure has now prejudiced Cullen as she has no access to the record and no Appendix from which to work.)

2. Cullen is filing along with this Motion for Extension of Time a Motion To Withdraw Record and, if the motion is granted, will arrange to have someone in Chicago transmit the record as expeditiously as possible to St. Louis

Wherefore, for the reasons stated herein, Cullen asks that the Court grant her motion and extend the time for filing her Petition for Rehearing by 10 days to November 18, 1999.

SOWERS & WOLF, LLC

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Attorneys for Appellee Rosalie Cullen

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing motion was forwarded this 3rd day of November, 1999, by first class mail, postage prepaid, to:

Mark G. Arnold
Husch & Eppenberger, LLC
100 N. Broadway, Suite 1300
St. Louis, Missouri 63102

/s/ Ferne P. Wolf
Ferne P. Wolf

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

November 5, 1999

No. 98-4277

ROSALIE CULLEN,
Plaintiff/Appellee,

vs.

OLIN CORPORATION,
Defendant/Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 97 C 31

The Honorable G. Patrick Murphy
United States District Judge

The following are before the court:

1. **APPELLEE'S MOTION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR REHEARING**, filed on November 4, 1999, by counsel for the appellee.

2. **APPELLEE'S MOTION TO WITHDRAW RECORD**, filed on November 4, 1999, by counsel for the appellee.

IT IS ORDERED that #1 is **GRANTED**. The appellee is granted a ten-day extension of time in which to file a Petition for Rehearing. The Petition for Rehearing, if any, is due November 18, 1999.

IT IS FURTHER ORDERED that #2 is **DENIED**. Counsel for the appellee mayi view the rocord on appeal under the supervision of the clerk of this court, but the record may not be withdrawn.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-4277

ROSALIE CULLEN,
Plaintiff/Appellee,

vs.

OLIN CORPORATION,
Defendant/Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

The Honorable G. Patrick Murphy
United States District Judge

PETITION FOR REHEARING

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Statement of the Case And Points On Which Cullen Is Seeking Rehearing

Cullen is asking this court to rehear its decision on Olin's appeal of the judgment rendered in this case. A jury returned a verdict for Cullen in her age discrimination case against Olin, and Olin appealed. On appeal, Olin argued that Cullen had failed to make a submissible case of age discrimination with direct evidence, had failed to make a submissible case of age discrimination with indirect evidence, and that the court erred in admitting evidence of Judy Eberhart's post-reduction-in-force ("RIF") performance.

This court held that Cullen presented sufficient evidence for the jury to have found age discrimination but overturned the jury's verdict based on the admission of evidence relating to another employee, Judy Eberhart, finding that first that the evidence was inadmissible and then, because of the emphasis placed upon it by counsel, that the admission of the evidence had prejudiced the jury.

Cullen is seeking rehearing of this court's decision on the issue of the admissibility of some (specifically, evidence relating to Eberhart's loss of the event marketing position in May 1996) of the evidence and, as to all of the challenged evidence, the court's conclusion that it was prejudicial to the verdict.

The evidence that was admitted and determined by this court to have been prejudicial centered around several documents relating to Eberhart's post-RIF performance: Eberhart's May 1996 performance review; a November 1996 memo from Eberhart to Harlan Kent discussing her having been placed on probation; and a March 1997 memo. As discussed below, the post-RIF evidence concerning Judy Eberhart occupied a small portion of what the jury heard and, in light of the quantity and quality of the other evidence, which focused on issues completely unrelated to Eberhart's post-RIF performance, the admission of the docu-

ments did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Williams v. Pharmacia, Inc.*, 137 F.3d 944,951 (7th Cir. 1998).

Argument

I. The Jury Had Ample Evidence From Which It Could Find Age Discrimination

As this court noted in its opinion, the jury had sufficient evidence from which to find age discrimination. The testimony of four witnesses as to age-biased statements made by the president of the company at the time he announced the RIF, coupled with the inconsistencies about the factors used in deciding whose job to eliminate, allowed the jury to reach its conclusion that there was age discrimination. There is no indication from anything in the record that the jury relied on post-RIF evidence at all.

II. The Post-RIF Evidence Relating to Eberhart Was a Small Piece of The Trial

During the four days of trial, the jury heard from eleven different witnesses, one of whom, Leon Schneider, was called in both Cullen and Olin's case and another, Harlan Kent, whose deposition was read by Cullen and then testified live in Olin's case. The jury received more than fifty exhibits. The challenged exhibits were a part of one of those exhibits (Exhibit 40, Joint Appendix Tab 11).

A. Cullen's Witnesses Testified Mostly About Cullen Herself, Age-Biased Statements, And the RIF Selection Process

Cullen called seven witnesses, one of whom testified through deposition. As discussed below, these witnesses testified about numerous areas having nothing to do with Judy Eberhart's post-RIF performance. Indeed, most did not mention Judy Eberhart at all.

Rosalie Cullen testified on the first and second days of trial and did not testify at all about Eberhart's post-RIF performance (Tr. 66-186).

Cullen's next four witnesses, Joan Carter, Karen Hulvey, James Herkert, and Betty Noble, did not testify about Eberhart's post-RIF performance. They testified about the all-important statements made by Doug Cahill when he announced the RIF (Tr. 192-230). While these four witnesses are grouped together here, so they occupy little space, their testimony was incredibly significant to the case. From their testimony the jury could have "concluded that Cahill targeted older employees for termination." Slip op., 9.

Harlan Kent testified in Cullen's case through the reading of his deposition to the jury (Joint Appendix, Tab 13, Tr. 234). As discussed below in connection with his live testimony, the only post-RIF issue relating to Eberhart was something Kent claimed, during trial, was related to Eberhart's performance in the event marketing position — which ended in May 1996 (Joint Appendix, Tab 13, page 54). Kent's deposition testimony came into evidence without objection and in that testimony Kent claimed, with regard to Eberhart, that no problems had been reported to him (Joint Appendix, Tab 13, page 54), opening the door for rebuttal with disciplinary materials. Olin stood mute while Kent testified that Eberhart had no problems and only objected when the concrete evidence of those problems was offered.

Cullen's next witness was Paul Clarence. During the adverse examination by Cullen's counsel, he testified for fewer than two pages about post-RIF problems with Eberhart (Tr. 249-251). The bulk of his testimony dealt with other issues (Tr. 236-57, except for 249-51). During its clarification examination of Clarence, Olin continued with its theme that it hires older workers by eliciting testimony from Clarence that he was only two years younger than Cullen (Tr. 258), and with its theme that the job he

took over from Eberhart was vastly different from Cullen's (leading the jury to de-emphasize Eberhart and focus more on Ventress) (Tr. 258-63).

Finally, Cullen called Leon Schneider as an adverse witness. Schneider's testimony dealt with numerous issues, including: 1) the RIF documents which included a false performance rating for Cullen (Tr. 286-87); 2) statements Schneider made to the EEOC concerning the RIF selection process (which were inconsistent with Olin's position at trial that performance was not an issue) (Tr. 293); 3) Olin's interrogatory answers (Tr. 296-302); the lack of specific goals in job elimination (Tr. 304); 4) Schneider's conferring with Harlan Kent over the names of the people to be discharged (Tr. 307-10); 5) part of Exhibit 40 relating to pre-RIF information concerning Judy Eberhart (Tr. 310-12); 6) the post-RIF documents — November 16, 1996 memo from Eberhart to Kent and August 15, 1997 memo to Eberhart from Chic Mohr (Tr. 313-19); 7) instructions to managers on how to conduct the layoffs and the managers' script (Tr. 319-321); 8) Schneider's role in assisting Kent, including lack of expectation that personnel files would be reviewed, Kent's lack of knowledge of Olin, and his claim that he did not tell Kent about Judy Eberhart's (pre-RIF) problems even though he knew Kent was keeping Eberhart (Tr. 321-27); and, 9) Olin's Code of Business Conduct (Tr. 328-331). Only the sixth listed item dealt with Eberhart's post-RIF problems, which consisted of six out of the forty-five pages of his testimony.

In Olin's clarification examination of Schneider, the focus was on: 1) Cullen's performance ratings (Tr. 332-335); 2) Eberhart's pre-RIF performance (Tr. 335-37); 3) Olin's summary of performance ratings, to attempt to convince the jury that a C was not that much different from an S (Tr. 337-38); 4) Schneider's meeting with the EEOC (Tr. 338-45); the First Amended Complaint (Tr. 346); 5) Olin's Supplemental Answers to Interrogatories (Tr. 346); 6) the overall RIF process (Tr. 349-50); 7) Schneider's role in the RIF process (Tr. 351-352); 8)

Eberhart's post-RIF memos (Tr. 352-53); 9) the age of another post-RIF hire, Chic Mohr (353-54); 10) the instructions for managers to follow while announcing the RIF (Tr. 354-55); and, 10) Olin's Code of Business Conduct (Tr. 355-58). Only the eighth listed item dealt with Eberhart's post-RIF conduct. On further adverse examination, Cullen's counsel asked Schneider about the original Complaint (Tr. 363) and Schneider's contact with the EEOC (Tr. 353-367), neither of which dealt with Eberhart's post-RIF conduct.

B. Olin's Witnesses Testified Mostly About the RIF Process and Olin's Financial Problems

Olin called five witnesses: Jay Wolff, William Gaston, Harlan Kent, Leon Schneider, and Doug Cahill. In three of the witnesses' testimony, Judy Eberhart's name did not come up at all. In Leon Schneider's testimony, it came up only in the context of salary. In Harlan Kent's testimony, it came up as a small part of testimony that covered numerous topics.

Olin's first witness, Jay Wolff, testified as to two main points: 1) his age at the time of the RIF, 51, and the fact that he was not laid off (Tr. 370); and, 2) Olin's financial problems (Tr. 370-75). Cullen's cross-examination dealt only with the financial problems. Judy Eberhart's post-RIF conduct was not mentioned.

Olin's second witness was William Gaston. Neither Olin's nor Cullen's examination of Gaston dealt with Eberhart's post-RIF conduct (Tr. 379-84).

Harlan Kent was Olin's third witness. Olin's direct examination of Kent did not touch at all on Eberhart's post-RIF conduct, but did cover a wide variety of areas, including: 1) Kent's background with other companies (Tr. 386-89); 2) his role when he was hired by Olin (Tr. 389-91); 3) the meeting in which Cahill made his age-biased remarks[1] (Tr. 391-92); 4) Cahill's role in the

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[1] Kent did not recall any comment about older workers (Tr. 392).

RIF (Tr. 392-93); 5) the decision-making process as to Rosalie Cullen and what happened to her job duties (Tr. 394-406); 6) the no-bumping policy (Tr. 406-408); 7) the role of salaries in the RIF (Tr. 408); 8) Kent's selection of Ventress and Eberhart rather than Cullen (Tr. 409-13); 9) the ages of Eberhart and Ventress (Tr. 414-15); 10) the transfer of Judy Eberhart and the rehiring of Clarence[2] (Tr. 415-16); 11) establishing Paul Clarence's age (Tr. 416-17); 12) the performance factor (Tr. 417-18); 13) Kent's telling Cullen she was being discharged (Tr. 418-19); 14) the fact that *post-RIF,* Kent hired someone in his 50's[3] (Tr. 420-21); and, 15) a listing of the people over 40 who were not RIF'ed and those under 40 who were (Tr. 421-23).

On cross-examination, Cullen's counsel questioned Kent about: 1) his background (Tr. 424); 2) his deposition testimony in general (Tr. 424-26); 3) his deposition testimony about Judy Eberhart's performance, which Kent claimed was only as to her position in event marketing (Tr. 426-29); 4) the November 17,1996 memorandum (part of Exhibit 40) from Eberhart to Kent (Tr. 429-431); 5) Eberhart's May, 1996 evaluation (which covered a pre-RIF period as well) (Tr. 432-34); 6) the March 14,1997 memo from Eberhart to Kent (Tr. 434-37); 7) an August 17,1997 memo from Mohr to Eberhart (Tr. 437-39); 8) the pre-RIF memo in Eberhart's personnel file that she sent to her supervisor and to Schneider (Tr. 439-40); 9) Kent's failure to discuss Eberhart's and others' performance with other managers prior to the RIF selection (Tr. 449-42); 10) Eberhart's performance post-RIF (Tr. 442-44); 11) Kent's and Mohr's salary (Tr.

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[2] Clarence was not even employed by Olin at the time of the RIF, yet Olin repeatedly touted him as another example of someone close to her age who took over her job duties. *See note 6, infra.* The circumstances of Clarence taking over Cullen's job duties thus became one that Cullen needed to have the opportunity to explain.

[3] The post-RIF decisions were again brought in by Olin presumably to show its record of no age bias.

444-45); and, 12) the selection committee for the RIF and its processes (Tr. 445-448). Eberhart's post-RIF performance was covered in the third through seventh listed topics and of those, the third and fifth listed item had to do with her job in event marketing — her transfer from which was made an issue by Olin in its opening statement.

In its redirect of Kent, Olin pointed out to the jury that the post-RIF items from November 1996 and March 1997 were, indeed, post-RIF and that Mr. Kent did not have a crystal ball (Tr. 449-50), so it was made clear to the jury that "these issues that were dealt with, this — these memos . . . had nothing to do with [Kent's] events marketing decision that was made nine months to a year before (Tr. 450). The remaining portion of Olin's redirect had nothing to do with Eberhart's post-RIF performance (Tr. 450-53).

Olin's fourth witness was director of personnel, Leon Schneider. Schneider testified about: 1) his communication with the EEOC[4] (Tr. 454-57); 2) his age at the time of the RIF (Tr. 457); 3) his duties (Tr. 457-58); 4) the meeting at which Cahill had made the age-biased remarks — Schneider was not present (Tr. 458-59); 5) his role in the reduction-in-force (Tr. 459-60); 6) his role in the decision to discharge Cullen (Tr. 460-62); 7) the no-bumping policy (Tr. 462-64); 8) the profile sheets used to analyze the workforce (Tr. 489-92); 9) comparative salary information regarding Maryann Ventress, Karen Kaylor, Phyllis Hill, and Rosalie Cullen (Tr. 492-94); 10) a description of a summary exhibits as to the demographics of the workforce before and after the RIF (Tr. 494-96); 11) a description of summary exhibits dealing with the impact of the RIF on employees, by age, and conclusions drawn therefrom (Tr. 496-500); 12)

[4] This had become an important issue as the EEOC representative's notes included performance as a factor in the RIF decision-making process, that the past two appraisals would be used — which was inconsistent with Olin's position throughout the trial *(compare,* Tr. 456-57 to Tr. 61).

Olin's press release relating to the RIF (Tr. 500-01); 13) the ages and ratings of certain employees (Tr. 501-03); 14) Olin's affirmative action and EEO policies (Tr. 503-04); and, 15) his meeting with Cleone Morris of the EEOC (Tr. 504-06). None of the examination dealt with Eberhart's post-RIF conduct.

On cross-examination, Cullen's counsel questioned Schneider about: 1) Eberhart's salary history and performance rating history, comparing her salary to Cullen's[5] (Tr. 506-10); 2) Schneider's statistical analysis (Tr. 512-18); 3) Schneider's notes from the RIF, showing marks by older workers' names (Tr. 518-24); and, 4) Olin's press release relating to the RIF as compared to its "market share" exhibit (Tr. 524-27). The only mention of post-RIF Eberhart had to do with her salary, pointing out the little Olin saved if, in fact, Eberhart had gotten any of Cullen's duties and thus showing that the cost-saving justification if, indeed, Eberhart was Cullen's successor, was untrue.

On redirect, Olin's counsel questioned Schneider about Eberhart's increase and, over the objection of Cullen's counsel, about Eberhart's performance (Tr. 527-29). The bulk of the redirect dealt with statistics and the ages of various employees (Tr. 529-34).

Olin's final witness was Doug Cahill, who was president of Winchester at the time of the reduction-in-force. Cahill testified about: 1) Winchester's financial problems (Tr. 537-41); 2) the steps he took to change the financial picture (Tr. 541-43); 3) the meeting at which he announced the RIF (Tr. 543-45); 4) his role in the RIF process (Tr. 545-46); and, 5) Rosalie Cullen (Tr. 546-47). On cross-examination, Cahill testified about the RIF decision-making process, its secretive nature, and the lack of defined goals (Tr. 548-53). On redirect, Cahill explained why there were no set goals (Tr. 553-55).

[5] Olin claimed cost-saving as a justification for discharging Cullen and had Schneider testify to the salaries of some of the people whom it claimed took over Cullen's duties, but conspicuously failed to mention Eberhart's salary.

III. Eberhart's Botching the Job Referred to Her Transfer Out of The Event Marketing Position, A Change Raised by Olin

The portion of Cullen's closing argument to which the court cites in its decision, that Eberhart "botched the job so badly" related to an issue raised first by Olin in its opening statement. In explaining what happened to Cullen's job duties, why she was not retained, and the fact that people close to her age ended up with her duties (clearly to sway the jury on the ultimate issue of age bias), Olin's counsel told the jury the ages of the people to whom Cullen's job duties were transferred. Olin's counsel explained that Judy Eberhart's job was reassigned three months after Cullen was terminated, at which time Paul Clarence, a 47-year old, took over.[6] As Olin's attorney pointed out to the jury, Clarence was "only two years younger than plaintiff" (Tr. 53). By bringing up 47-year old Paul Clarence's takeover of Eberhart's job, Olin opened the door for Cullen to explain to the jury why Eberhart had lost it.[7] Without that explanation, Olin would have left the jury with the unrefuted impression that it was a company that would freely transfer and hire older workers.[8] Cullen was

[6] Clarence was not even employed by Olin at the time of the RIF, yet Olin repeatedly touted him as one of Cullen's replacements and as another example of someone close to her age who took over her job duties *(see, e.g.,* Olin's closing argument, Tr. 592, "I also want to submit to you that at age 49 plaintiff was not really old. And in these various duties that people picked up there was not substantial difference in age. And a whole lot of them were in the protected age group. Maryann Ventress was 43-42. [sic] Eberhart was 43. Phyllis Hill was 46. Paul Clarence was 47."). The circumstances of Clarence taking over Cullen's job duties thus became one that Cullen needed to have the opportunity to explain.

[7] Kent testified that Eberhart was transferred out of the event marketing job because Paul Clarence returned to the company (Tr. 415).

[8] This theme was repeated during live testimony when Olin's counsel emphasized the age of anyone who was at all involved in the case. For

(Footnote 8 continued on next page)

entitled to explain that such was not the case. Thus, through the introduction of evidence and then, in one sentence of closing argument, Cullen's counsel explained that Eberhart had "botched the job" (Tr. 577). ("Botching the job" is the *only* mention of Eberhart's post-RIF problems in Cullen's closing. The documents that this court ruled should not have been admitted were not mentioned at all, with the only reference to Eberhart's file being a pre-RIF letter (Tr. 571-72)).

IV. Evidence Relating to Eberhart Was Not a Key, As Olin Claimed That Maryann Ventress, And Not Eberhart. Was the True Successor to Cullen

Olin told the jury that the main person to take over Cullen's job duties was Maryann Ventress (Tr. 64). Indeed, when Olin offered the testimony of the personnel manager, Leon Schneider, as to the cost savings engendered by discharging Cullen, Olin's counsel did not even ask Schneider to compare Eberhart's comparative salary to Cullen's. (Tr. 492-94). Based on Olin's position, the jury could have believed that Eberhart was a nonissue, so that any evidence relating to Eberhart would not have swayed the jury at all.

V. Cullen's Theme Was That Olin's President Gave the Age-Related Marching Orders for RIF Decisions, They Were Carried Out, And What Followed Was Lie After Lie As to The Factors Used in Decision-Making

If there was any theme to Cullen's case it was that Olin had lied repeatedly about why it selected Rosalie Cullen for termination

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(Footnote 8 continued)

example, Jay Wolff was Olin's first witness. Olin called Wolff to testify about various financial documents to show Winchester's problems at the time of the RIF (Tr. 369). Although there was no issue concerning his being affected by the RIF, Olin had him testify to his age before he testified about finances (Tr. 369-70).

and that Olin's president had indicated his age bias when he was announcing the RIF. In opening statement, Cullen's counsel gave an overview of the case, discussing: Cullen's excellent employment history (Tr. 31, 36); Olin's financial problems (Tr. 32); Doug Cahill's age-biased comments (Tr. 32); the secret decision-making process, from which there were no records (Tr. 33); Olin's claimed "no bumping" policy, how it was inconsistent with what Olin did to Cullen, and then how the policy seemed to change during the course of discovery (Tr. 33-34); documented pre-RIF performance problems of Judy Eberhart (Tr. 38-40); post-RIF evidence relating to Eberhart (Tr. 40-41); Kent's changing his mind about firing two older men (Tr. 41-42); Olin's lying about Cullen's performance ratings on its documents (Tr. 42-43); Olin's lying about whose positions had actually been eliminated, as inconsistent with the testimony of Harlan Kent (Tr. 36-37); and, Olin's lying in the answer to Cullen's Complaint (Tr. 43-44). The discussion of Eberhart's post-RIF problems occupied a small percentage of Cullen's opening statement.[9] Olin's opening did not deal extensively with the post-RIF Eberhart issue either, occupying less than a page of the transcript (Tr. 62).

Cullen's closing argument was similarly focused on Cahill's age-biased statements, Olin's lies about evaluations, and its shifting of position as to importance placed on actual performance. As discussed above, the one mention of Eberhart's post-RIF conduct in Cullen's closing argument was to deal with the theme Olin stressed throughout the trial — that a succession of older workers had been chosen by Olin to take Cullen's place. A position that, left unrebutted by evidence of Eberhart's problems

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[9] In the opinion, the court lists counsel's emphasis on post-RIF evidence, stating, *inter alia*, that counsel read virtually the entire text of the disputed documents to the jury. The reference to the documents in opening statement (Tr. 41-42) was to just one of the documents (Joint Appendix, Tab 11, pp.13-14).

and the reason she was moved out of the event marketing position, would have left the impression with the jury that Olin, if anything, favored older workers, not that they brought an former, older worker (Paul Clarence) back because of an urgent need.

Conclusion

The jury had strong evidence of Olin's predisposition to carry out its RIF by firing older workers, when it heard from four former Olin employees who testified to statements made by Olin's president as he announced the RIF. It had strong evidence of Olin's mendacity when it saw fabricated employee ratings for Cullen, heard that Olin's position to the EEOC was that performance ratings were considered, saw its Code of Business Conduct that gave performance as a consideration in layoffs, and then heard Olin repeatedly deny at trial that performance was a consideration when it came to deciding to discharge Rosalie Cullen. The minor role of post-RIF evidence regarding Judy Eberhart should not result in overturning the verdict of age discrimination.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that two copies of the foregoing brief and a disk containing the Petition for Rehearing were forwarded this 17th day of November, 1999, by first class mail, postage prepaid, to:

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/s/ Ferne P. Wolf
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APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, IL 60604

November 30, 1999

No. 98-4277

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

ROSALIE CULLEN,
Plaintiff-Appellee,

v.

OLIN CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois

No. 97 C 31

G. Patrick Murphy, *Judge*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause on November 18, 1999, by the plaintiff-appellee, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.